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HOUSE BILL NO. 2475

Offered January 9, 2019

Prefiled January 9, 2019

A BILL to amend and reenact §§ 2.2-4303 and 2.2-4321.2 of the Code of Virginia, relating to the Virginia Public Procurement Act; use of competitive negotiation for construction; exemption from certain requirements related to contracting for public works.

Patrons—Torian and Krizek

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That §§ 2.2-4303 and 2.2-4321.2 of the Code of Virginia are amended and reenacted as follows:****§ 2.2-4303. Methods of procurement.**

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. Goods, services other than professional services, and insurance may be procured by competitive sealed bidding or competitive negotiation.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction projects where the project cost is expected to be \$500,000 or less may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances:

1. By any public body on a fixed price design-build basis or construction management basis as provided in Chapter 43.1 (§ 2.2-4378 et seq.); or

2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination.

Construction projects where the project cost is expected to be more than \$500,000 may be procured only by competitive negotiation.

E. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a

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59 newspaper of general circulation on the day the public body awards or announces its decision to award
60 the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of
61 General Services' central electronic procurement website shall be required of any state public body.
62 Local public bodies are encouraged to utilize the Department of General Services' central electronic
63 procurement website to provide the public with centralized visibility and access to the Commonwealth's
64 procurement opportunities.

65 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
66 sealed bids or competitive negotiation for single or term contracts for:

67 1. Goods and services other than professional services and non-transportation-related construction, if
68 the aggregate or the sum of all phases is not expected to exceed \$100,000; and

69 2. Transportation-related construction, if the aggregate or sum of all phases is not expected to exceed
70 \$25,000.

71 However, such small purchase procedures shall provide for competition wherever practicable.

72 Such purchase procedures may allow for single or term contracts for professional services without
73 requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to
74 exceed \$80,000.

75 Where small purchase procedures are adopted for construction, the procedures shall not waive
76 compliance with the Uniform State Building Code.

77 For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall
78 require the (a) written informal solicitation of a minimum of four bidders or offerors and (b) posting of
79 a public notice on the Department of General Services' central electronic procurement website or other
80 appropriate websites. Posting on the Department of General Services' central electronic procurement
81 website shall be required of any state public body. Local public bodies are encouraged to utilize the
82 Department of General Services' central electronic procurement website to provide the public with
83 centralized visibility and access to the Commonwealth's procurement opportunities.

84 H. Upon a determination made in advance by a public body and set forth in writing that the purchase
85 of goods, products or commodities from a public auction sale is in the best interests of the public, such
86 items may be purchased at the auction, including online public auctions. Purchase of information
87 technology and telecommunications goods and nonprofessional services from a public auction sale shall
88 be permitted by any authority, department, agency, or institution of the Commonwealth if approved by
89 the Chief Information Officer of the Commonwealth. The writing shall document the basis for this
90 determination. However, bulk purchases of commodities used in road and highway construction and
91 maintenance, and aggregates shall not be made by online public auctions.

92 I. The purchase of goods or nonprofessional services, but not construction or professional services,
93 may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway
94 construction and maintenance, and aggregates shall not be made by reverse auctioning.

95 **§ 2.2-4321.2. Public works contract requirements.**

96 A. As used in this section:

97 "Public works" means the operation, erection, construction, alteration, improvement, maintenance, or
98 repair of any public facility or immovable property owned, used, or leased by a state agency.

99 "State agency" means any authority, board, department, instrumentality, institution, agency, or other
100 unit of state government. "State agency" shall not include any county, city, or town.

101 B. Except as provided in subsection F or as required by federal law, each state agency, when
102 engaged in procuring products or services or letting contracts for construction, manufacture,
103 maintenance, or operation of public works paid for in whole or in part by state funds, or when
104 overseeing or administering such procurement, construction, manufacture, maintenance, or operation,
105 shall ensure that neither the state agency nor any construction manager acting on behalf of the state
106 agency shall, in its bid specifications, project agreements, or other controlling documents:

107 1. Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to
108 agreements with one or more labor organizations, on the same or related public works projects; or

109 2. Otherwise discriminate against bidders, offerors, contractors, subcontractors, or operators for
110 becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or
111 more labor organizations, on the same or other related public works projects.

112 Nothing in this subsection shall prohibit contractors or subcontractors from voluntarily entering into
113 agreements described in subdivision 1.

114 C. A state agency issuing grants, providing financial assistance, or entering into cooperative
115 agreements for the construction, manufacture, maintenance, or operation of public works shall ensure
116 that neither the bid specifications, project agreements, nor other controlling documents therefor awarded
117 by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any
118 construction manager acting on behalf of such recipients, shall:

119 1. Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to
120 agreements with one or more labor organizations, on the same or related projects; or

121 2. Otherwise discriminate against bidders, offerors, contractors, subcontractors, or operators for
122 becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or
123 more labor organizations, on the same or other related projects.

124 D. If an awarding authority, a recipient of grants or financial assistance, a party to a cooperative
125 agreement, or a construction manager acting on behalf of any of them performs in a manner contrary to
126 the provisions of subsection B or C, the state agency awarding the contract, grant, or assistance shall be
127 entitled to injunctive relief to prevent any violation of this section.

128 E. Any interested party, which shall include a bidder, offeror, contractor, subcontractor, or operator,
129 shall have standing to challenge any bid specification, project agreement, neutrality agreement,
130 controlling document, grant, or cooperative agreement that violates the provisions of this section.
131 Furthermore, such interested party shall be entitled to injunctive relief to prevent any violation of this
132 section.

133 F. The provisions of this section shall not:

134 1. *Apply to any contracts for the construction of public works where the project cost is expected to*
135 *be more than \$500,000.*

136 2. Apply to any public-private agreement for any construction or infrastructure project in which the
137 private body, as a condition of its investment or partnership with the state agency, requires that the
138 private body have the right to control its labor relations policy and perform all work associated with
139 such investment or partnership in compliance with all collective bargaining agreements to which the
140 private party is a signatory and is thus legally bound with its own employees and the employees of its
141 contractors and subcontractors in any manner permitted by the National Labor Relations Act, 29 U.S.C.
142 § 151 et seq., or the Railway Labor Act, 45 U.S.C. § 151 et seq.;

143 ~~2.~~ 3. Prohibit an employer or any other person covered by the National Labor Relations Act or the
144 Railway Labor Act from entering into agreements or engaging in any other activity protected by law; or

145 ~~3.~~ 4. Be interpreted to interfere with the labor relations of persons covered by the National Labor
146 Relations Act or the Railway Labor Act.